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No. 81-2329

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNION TEXAS PETROLEUM, a Division of Allied Chemical Corporation, ET AL.,
Petitioners,

v.

CORPORATION COMMISSION OF OKLAHOMA and HARVEY W. DIERKSEN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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June 7, 1982

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QUESTIONS PRESENTED

1. Whether Oklahoma takes petitioners' property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution where:
   a. petitioners are owners of interests in oil and gas;
   b. petitioners' interests had been included in 640-acre oil and gas drilling and spacing units;
   c. such inclusion modified petitioners' common-law and contract rights so that owners of tracts where wells were drilled were compelled for many years to share their production with all owners within 640-acre governmental sections; and
   d. Oklahoma reduces the size of the units so as to deny any legal right to share in future production of those who were forced to share their production from 3/4 of the original units, and to give 100% of such future production to those who have already enjoyed 75% of the original production; cast a cloud on petitioners' title to oil and gas leases; and force petitioners to drill numerous wells and spend huge sums of money to preserve their leases.
2. Whether Oklahoma violates the Just Compensation and Due Process Clauses by choosing among alternative statutory remedies that remedy most destructive of petitioners' rights.
3. Whether Oklahoma violates the Due Process Clause when it vacates long-standing proration orders, pursuant to which valuable property rights have been developed or maintained, without considering the de-

structive effect of its action on petitioners' rights and without giving a reasoned explanation of its actions.

4. Whether the legislative action of the Oklahoma Corporation Commission described above impairs petitioners' contracts in violation of the Contract Clause.

PARTIES

Petitioners:

Amerada Hess Corporation
Atlantic Richfield Company
Champlin Petroleum Company
Gungoll, Carl E.
Henry H. Gungoll Associates
Ladd Petroleum Corporation
Mack Oil Company
Odessa Natural Corporation
Oklahoma Natural Gas Corporation
Okmar Oil Corporation
Union Texas Petroleum, a Division of Allied Chemical Corporation
Ward, L. O.
Woods Petroleum Corporation

Respondents:

Corporation Commission of the State of Oklahoma
Dierkson, Harvey W., *et al.**
Eason Oil Company
Harper Oil Company
Singer-Fleischaker Oil Operating Company, Inc.
Tenneco Oil Company
Union Oil Company of California

*Additional parties to the Corporation Commission proceeding below are listed in the Appendix.

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OCTOBER TERM, 1981

UNION TEXAS PETROLEUM, a Division of Allied Chemical Corporation, ET AL.,
Petitioners,

v.

CORPORATION COMMISSION OF OKLAHOMA and HARVEY W. DIERKSEN, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners UNION TEXAS PETROLEUM, a division of Allied Chemical Corporation, CHAMPLIN PETROLEUM COMPANY, ATLANTIC RICHFIELD COMPANY, AMERADA HESS CORPORATION, OKLAHOMA NATURAL GAS COMPANY, HENRY H. GUNGOLL ASSOCIATES, L. O. WARD, CARL E. GUNGOLL, WOODS PETROLEUM CORPORATION, ODESSA NATURAL CORPORATION, MACK OIL COMPANY, OKMAR OIL CORPORATION, and LADD PETROLEUM COMPANY, respectfully pray that a writ of certiorari issue to review the judgment and opinons of the Supreme Court of the State of Oklahoma entered in this proceeding on July 21, 1981, and March 8, 1982.

OPINIONS AND ORDERS BELOW

The opinion of the Oklahoma Supreme Court in *Union Texas Petroleum* v. *Corporation Commission of Oklahoma* is not yet published. The majority and dissenting opinions are reproduced beginning at page 1a of the Appendix. The unpublished decision of the Oklahoma Corporation Commission in Order No. 148243, the affirmance of which is the subject of this petition, is reproduced beginning at page 48a of the Appendix.

JURISDICTION

Order No. 148243 of the Oklahoma Corporation Commission ("Commission") was signed on January 3, 1979. The decision of the Oklahoma Supreme Court affirming the Commission was issued on July 21, 1981. All petitioners timely sought rehearing. The Oklahoma Supreme Court denied the petition for rehearing on March 8, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) (1976).

STATUTES INVOLVED

52 Okla. Stat. (1981), §87.1(d):

"The Commission shall have jurisdiction upon the filing of a proper application therefor, and upon notice given . . ., to decrease the size of the well spacing units or to permit additional wells to be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of wastes prohibited by statute, or any of said wastes, or will

protect or assist in protecting the correlative rights of persons interested in said common source of supply . . ."

STATEMENT OF THE CASE

The Legislature of the State of Oklahoma has vested in the Oklahoma Corporation Commission certain authority to regulate the production of oil and gas. Included in that delegation is the authority to establish the size of well spacing units and the number of wells that may be drilled within those units.

Acting under this authorization, in the early 1960s the Commission established a 640-acre spacing pattern for portions of the Mississippian Formation covering 88 sections of land in Garfield and Major Counties, Oklahoma. Petitioners hold oil and gas leases in the area administered by the spacing rule. At issue here is Oklahoma's action deleting the 640-acre spacing pattern and replacing it with a 160-acre pattern.

The nature of the search for and production of oil and gas presents unique problems in the accommodation of private property rights with the public interest in conservation and long term exploitation of resources.

Oklahoma follows the rule of capture; the owner of mineral rights underneath a tract of land ordinarily owns any oil or gas produced through a well drilled on that tract. It makes no difference whether the oil and gas so produced originally underlaid his property or that of his neighbors; whoever reduces the hydrocarbons to possession is the owner. This necessarily encourages each owner to

drill his own well and to produce it as rapidly as possible, thus tending to result in the drilling of more wells than necessary and production at a rate which decreases ultimate total recovery.

To prevent the waste associated with exploration and production under the rule of capture while protecting the rights *inter sese* of mineral interest owners, Oklahoma enacted a comprehensive scheme for the regulation of oil and gas production and exploration, which limits the number of wells that can be drilled and the rate at which they can be produced. As part of that scheme, the Oklahoma Corporation Commission, an administrative agency with some powers of a court of record, is authorized to establish drilling and spacing units covering common sources of supply of oil and gas. Such units may cover up to 80 acres for sources of supply which are predominantly productive of oil and may cover up to 640 acres for those predominantly productive of gas. 52 Okla. Stat. (1981), §87.1.

Once a drilling and spacing unit has been established, a proportionate share of production from any well therein is allocated to all separate mineral interest owners in the unit. Only one well can be drilled in a drilling and spacing unit unless the Corporation Commission finds that additional wells will assist in the prevention of waste, drainage or injury to correlative rights.

Oil and gas leases, including the ones involved herein, typically are made for a set term of years (the primary term) plus as long thereafter as oil and gas are produced from the leased premises in paying quantities.

Since production from a unit well is treated legally as if it had been produced from each separately owned tract within a drilling and spacing unit, such unit well production serves to extend the life of all leases within the unit for as long as it continues. Permanent cessation of production causes the leases to terminate.

Each of the 88 governmental sections involved below was spaced during the 1960s on a 640-acre basis, and almost all had at least one commercial well drilled on them. The production from each unit well has been shared through the years by all persons owning mineral interests within the unit and by their lessees. Without the spacing order, the owner of the minerals under the tract where the well was located, and his lessee, would have had the legal right to all the minerals produced therefrom under the rule of capture. With spacing, they, in effect traded a share of their production for a share of the production that would be obtained from the rest of the section, either by the drilling of additional wells or by the unit well being capable of draining the full 640-acre section.

The Corporation Commission, on application instigated by individuals who had acquired top leases in the area, i.e., leases that would commence only when existing leases terminated, and filed by respondents who had sold such top leases, replaced the existing 640-acre spacing, with its one well per governmental section, with 160-acre spacing, which would permit four wells per section under the authority of 52 Okla. Stat. (1981), §87.1(d) which provides:

> "The Commission shall have jurisdiction . . . to decrease the size of the well spacing units or to permit additional wells to be drilled . . . upon proper proof

> . . . that such modification . . . will prevent or assist in preventing the various types of wastes . . . or assist in protecting the correlative rights of persons interested . . ."

The basis of the Commission's action was its factual finding that the existing unit wells were incapable of draining the entire 640-acre units, which finding was based on respondents' testimony that the existing wells had drained only the 160-acre quarter section on which they were drilled. While petitioner strenuously disputed the correctness of that finding, it was affirmed by the Oklahoma court, and therefore is binding here. (Appendix at 1a.) Thus, Oklahoma found, on the one hand, that owners and lessees on whose property unit wells had been drilled and who had therefore shared the production from their land, had not in the past received a share of production from the remaining land (since their wells drained only 160 acres); and, at the same time, took away their vested right to share by law in the future production from 3/4 of the unit by deleting the spacing units under which the sharing would have been required. The production share thus taken was given to owners of interests in the 480 acres outside the quarter section where the well was drilled, who had already received 75% of the production from the original unit well.

The transparent purpose of the applications was to attempt to cause the leases in those quarter sections where no unit well was located to terminate for cessation of production so that the top leases would come into effect. While, as yet, no leases have been cancelled, some petitioners have commenced litigation in the Oklahoma courts

to determine the effect of the respacing on petitioners' leases.[1] At a minimum, it is clear under Oklahoma law that petitioners will be forced to drill a well in each quarter section affected within a very short time, if the leases are to be preserved. Precisely what this time period will be depends on the particular lease provisions. Some leases may contain cessation of production clauses, and, where the lease is silent, the common law implies a reasonable time for a lessee to resume production after cessation of production.

Moreover, respondents doubtless will contend in the district court actions now pending that the leases terminated instantly when the respacing order was entered. Petitioners see no basis under Oklahoma law for such a contention, but the precise issue apparently has never been decided. While consideration of any potential impact on the continued life of petitioners' leases is premature in the absence of either a state court decision terminating leases or a clear provision of Oklahoma law requiring termination, both the sudden requirement that up to 250 wells be drilled in a short time at a total cost that easily will exceed 100 million dollars, and the necessity for multiple lawsuits to defend title, are real injuries to petitioners' rights directly flowing from the respacing order. Respondents' brief in response to this Petition perhaps will shed additional light on their contentions regarding lease termination.

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[1] Since the filing of the respacing application herein, the Commission has refused to permit petitioners, or anyone else, to drill additional wells in the subject area. Thus, petitioners have been denied the opportunity to protect themselves from the emergency situation they will face if the Order is affirmed.

In the past, upon proof of changed conditions, the Commission has acted to prevent waste and to protect correlative rights by allowing additional wells to be drilled on each unit, thus allowing sharing in all production from the section, rather than by abolishing spacing on a field-wide basis.

Petitioners argued to the Commission that if additional development was required, the appropriate statutory remedy would be to permit additional wells to be drilled within the established 640-acre units as expressly provided in Section 87.1, and that deletion of the existing units would destroy petitioners' private property rights in violation of Fourteenth Amendment protections. The Commission nevertheless chose to vacate its prior 640-acre spacing order and to establish 160-acre spacing units for the Mississippian Formation.

The Commission's stated rationale for its selection of remedy was that relying on increased density would constitute an indirect delegation of its duties and responsibilities:

> "[T]he interest of the Commission in the prevention of waste and in the protection of correlative rights and the duty and responsibility of the Commission to prevent waste and protect correlative rights require that the Commission not act in derogation of its interest, duty and responsibility by such *an indirect delegation of its duty and responsibility to any owner whose subjective interests may be in conflict with the ends of waste prevention or correlative rights protection . . .*"

Appendix at 78a (emphasis added), and:

> "[I]n this instance the Commission concludes that *the establishing of 160-acre units is the proper relief, even though other relief may be available,* based on the substantial evidence herein . . ."

Appendix at 80a (emphasis added).

The Commission thus rejected the statutory remedy that would have allowed additional drilling *and* avoided destruction of petitioners' property. The Commission gave no consideration to the consequences of its order for petitioners' property rights. There was no finding or evidence that petitioners' interests conflicted with the statutory objectives of preventing waste and protecting correlative rights, or that the wells necessary to achieve these statutory objectives would or would not be drilled by any particular party, applicant or protestant, as a result of the chosen remedy.

The Commission's Order No. 148243 was signed by two of the three commissioners. The chairman declined to sign.

Petitioners argued to the Oklahoma Supreme Court that Order No. 148243 took their property without compensation for the benefit of others, deprived them of due process as an arbitrary application of police power, and interfered with petitioners' vested rights (citing Contract Clause cases). In a 5-4 decision, the Oklahoma Supreme Court affirmed.[2] With respect to the Commission's choice of remedies the court stated as follows:

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[2] Petitioners argued their United States constitutional claims in their Petition in Error, in their brief, in their Reply Brief, and in their Petition for Rehearing. The dissenting opinion specifically relied on these constitutional issues. Appendix 41a.

> "Factually, the record contains indicia that for extended periods of time, Commission orders allowing additional wells on the basis of inability to recover known reserves have not been carried out."

Appendix at 24a.

In addition to being largely irrelevant, since neither respacing nor authorizing increased density imposes any obligation to drill, the court's finding that past authorizations to drill additional wells had not been carried out with dispatch is without substantial evidentiary support. Moreover, even if true, it could not have justified the invasion of petitioners' rights worked by this Order.

The majority's opinion did not otherwise address petitioners' claims under the federal constitution.

On Petition for Rehearing filed with the Oklahoma Supreme Court, petitioners once more urged their federal constitutional claims. Neither the Corporation Commission nor the Supreme Court of the State of Oklahoma majority opinion vindicated, or even expressly addressed, petitioners' claimed rights under the federal constitution.

REASONS FOR GRANTING WRIT

This Court should grant the requested writ for two basic reasons. First, petitioners' valuable property rights have been taken or destroyed without compensation and their contract rights impaired by an arbitrary and unlawful exercise of delegated police powers. This should be corrected. Many millions of dollars in oil and gas production and leasehold interests are at stake. Second, this case involves important federal questions relating to Fifth and Fourteenth Amendment and Contract Clause constraints on the authority of state administrative agencies in their exercise of delegated police powers to nullify long-standing orders pursuant to which valuable property rights have developed, destroying those unnecessarily.

For many years, the properties involved in this case were developed under orders establishing spacing units of 640 acres per well. During this period, petitioners' leasehold interests became inextricably intertwined with the legal effect of the Commission's orders attributing production from unit wells to other acreage within the unit. In the language of this Court, "reasonable investment backed expectations" intervened. *Cf. Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). By administrative fiat, on the application of parties who stood to gain from the termination of petitioners' leases, the Commission cancelled its long-standing order purportedly "to assure that those wells reasonably required to prevent waste and protect correlative rights can or will be drilled." Appendix at 65a.

The subject matter is not unique to this case. It should be addressed by this Court for the protection of petitioners'

property rights and for the guidance of state administrative agencies in discharging their police power responsibilities.

1. The Commission's Order Effects a Taking of Petitioners' Property for the Benefit of Respondents Contrary to Fourteenth Amendment Protections.

The effect of the respacing order is to take the property of those with interests in the quarter sections where wells have been drilled and give it to others. It is undeniable that the vested right under Oklahoma law of those holding interests in the quarter section where the well is, to share in production from the other three quarter sections has been extinguished, and that 100% of the legal right to that production has now been given to those holding mineral interests to which 3/4 of the production from the unit wells already has been attributed.

Justice Barnes, in dissent below, joined by Justices Hodges and Simms,[3] would have held that the respacing took petitioners' property for the benefit of others and violated the Fourteenth Amendment.

> "The 640-acre unit wells have been in existence since the early 1960s and, but for the spacing orders, the owner or owners of the minerals under the land upon which the unit well is located would have received 100% of the royalty from the well. Because of the spacing orders, such owner has shared the royalty proceeds with the other mineral owners in the 640-acre unit. If the order of the Commission stands,

[3] Chief Justice Irwin dissented without opinion.

such owner or owners will find that they now own 100% of the royalty attributable to the *partially* depleted unit well, and have been stripped of any participation in the production of any additional well or wells that may be drilled in the governmental section that formerly comprised the 640-acre unit. That parties who have shared their royalty under the compulsion of the statutory unit should be deprived of any right to share in the production from any additional wells that might be drilled in the unit acreage is a gross inequity and a violation of their vested rights. Thus, there is no substantial evidence that the order is necessary to protect correlative rights, but in fact, the order violates those rights.

Indeed, the order entered unnecessarily takes the Appellants' property for the benefit of others and is an unreasonable extension of the police power in the prevention of waste and thereby violates the constitutional rights of Appellants."

Appendix at 40a-41a.

Many cases have raised the constitutionality of oil and gas spacing and proration statutes; apparently none before this have considered the nature of the rights created by such statutes. In Oklahoma, the right of all interest owners to share *pro rata* in unit production is the *quid pro quo* for the loss of their individual rights to drill, *Ward* v. *Corporation Commission*, 501 P.2d 503 (Okla. 1972), and that *quid pro quo* is held to be constitutionally required. *Id.* at 507. Here, the State has suddenly shifted course and has taken from petitioners the benefit they were to receive for sharing their production. The taking of petitioners' property could hardly be clearer.

For instance, assuming that A, B, C and D each own the whole mineral interest in a quarter section, within a 640-acre unit and the unit well was drilled on A's tract, A has since shared production from the well; in fact, B, C and D have received 75% of that production. The Corporation Commission found, and the Oklahoma Supreme Court agreed, that A's well could not drain the entire 640-acre unit., based on testimony that each well was capable of draining only 160 acres. Thus, the shared production has come from the quarter section where the well is located. A has given up 3/4 of the production from his land in return for the expectation that all production from the unit would be through the unit well in which he is entitled by law to share. He is now deprived of this right to participate in production from B, C and D unless Oklahoma's action is reversed.

Had Oklahoma, in originally spacing this area, required the owners of interests in the quarter sections where wells have been drilled to share production with their neighbors in the other three quarter sections while permitting the owners in those three to drill their own wells and retain all the production, surely no one could dispute that a taking had occurred. Yet, that is precisely the situation which Oklahoma has now retroactively created by this Order.

Moreover, since the purpose of the applications here was to force cancellation of petitioners' leases, something the Commission has no power to do directly, it would be naive to ignore the impact of this Order on leasehold rights. Even though petitioners may well succeed in preserving all

their leases, they will, if this Order is affirmed, do so only at huge expense which is entirely unjustified by any legitimate state interest.

State action that affects private property rights is a valid exercise of police power only if it is reasonably necessary to the interest of the public generally and not unduly oppressive. *Penn Central Transportation Co.* v. *New York*, 438 U.S. 104 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962); *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894). *See San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 646-663 (1981) (Brennan, J., dissenting from dismissal for lack of a final judgment). Quoting *Lawton*, this Court stated in *Goldblatt:*

> "The classic statement of the rule . . . is still valid today:
>
> > 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' "

Goldblatt v. *Hempstead*, 369 U.S. at 594-595.

This Court has identified a number of considerations that are relevant here:

1. Economic impact on the claimaint. *See Penn Central Transport Co.* v. *New York*, 438 U.S. at 124; *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. at 648 (Brennan, J., dissenting); *Kaiser Aetna* v. *United States* 444 U.S. at 175.

2. Interference with reasonable investment-backed expectations. *See id.*

3. Availability and effectiveness of less drastic alternatives. *See Goldblatt* v. *Hempstead*, 369 U.S. at 595.

4. Loss claimants will suffer. *See id.*

The Commission's order does not withstand analysis with respect to any of these matters. It ignores the economic impact on petitioners, the interference with reasonable investment-backed expectations resulting from years of operation under the prior spacing, and the loss petitioners will suffer. The availability of a less drastic alternative, increased density, is rejected by the Commission on ephemeral grounds.

As Justice Brennan stated, in dissenting from dismissal for want of a final judgment in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. at 640:

> "The principle applied in all these cases has its source in Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 US 393, 415 (1922) in which he stated: 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' "

This Order goes too far.

2. Order No. 148243 Is Not a Valid Exercise of Police Powers.

Section 87.2 authorizes the State to act to modify spacing units or increase density upon evidence that the action will: (i) prevent or assist in preventing waste; or (ii) protect correlative rights of persons interested. While these obviously constitute legitimate State interests, the action taken is not rationally related to the furtherance of either.

The issue of protection of correlative rights can be disposed of without extensive argument. The destruction of the existing units and their replacement with smaller ones works an obvious disruption of correlative rights which increasing density would not. Petitioners do not read either the Corporation Commission or the Oklahoma Court as suggesting to the contrary.

In truth, it is clear that the Commission order and its affirmance were based on the notion that increased density relied on the discretion of the lessee to instigate an application and that respacing avoided that problem. Thus, the conclusion was reached that the choice of respacing furthered uniform development and therefore assisted in prevention of waste. As the Court stated:

> "The Commission concluded that the protestants desire to have further development on an increased density basis upon application by an owner of a unit when he determines that such action should be taken. The Commission concluded leaving that decision to the individual unit owners, under the circumstances, amounts to an indirect delegation of its duty to oversee prevention of waste and protection of correlative rights."

Appendix at 21a.

The Commission Order, at page 21, is even clearer.

> "[T]he Commission [may] not act in derogation of its interest, duty and responsibility by such an indirect delegation of its duty and responsibility to any owner whose subjective interests may be in conflict with the ends of waste prevention or correlative rights protection."

Appendix at 78a.

Both halves of the Commission-Court equation are flatly, incontrovertibly wrong. First, increased density is not at the mercy of lessees whose interest conflicts with that of the State. Second, development under respacing is subject to precisely the same contingencies as development under intensification of drilling.

The notion that relying on increased density is an indirect delegation of the Commission's authority is absurd. There are two steps that must concur before any well is drilled. First, the Commission must permit the well to be drilled. This it does either by spacing which authorizes one well per unit or by increasing density which authorizes as many wells in a unit as the Commission sees fit. Second, the person owning the right to drill must decide it is in his economic interest to drill.

Either respacing or increasing permitted density to four wells per unit, one in each quarter section, would result in the same legal authority for the drilling of the same number of wells. Thus, the two remedies are manifestly the same on this point. To the extent the Commission may have been suggesting that it would need to await a lessee's application for increased density, the Commission ignored three facts. First, there was already pending respondents'

application under which the Commission was empowered to order the increased density[4] since §87.1 authorized either decreasing the size of units or increasing density on the same evidentiary sharing. Second, increased density applications may be filed not only by a lessee, but by any person owning part of the mineral interest, any person owning a right to drill, or the Commission's own Conservation Officer. 52 Okla. Stat. (1981), §87.1. Third, if the Commission's concern was that a lessee would have no incentive to drill additional wells, Oklahoma law requires a lessee to drill such wells as may be necessary for full development, or face cancellation of his lease. *Vincent* v. *Tideway Oil Programs, Inc.*, 620 P.2d 910 (Okla. 1980).

3. When a State Agency Vacates an Order and Policy of Long Standing, Due Process Requires That It Articulate the Basis for Its Actions Sufficiently to Permit Judicial Review.

This Court has established the principle that agency conduct seriously impairing long-standing rights cannot be implemented without reasoned justification. *See Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954). Under the Fourteenth Amendment, the Oklahoma Corporation Commission enjoys no greater latitude than does a federal administrative agency, whose standard this Court has said "coincides with that of

[4] In argument before the Commission, petitioners asked the Commission to increase authorized density to four wells per section, as an alternative to respacing, for all lands covered by the respacing application.

the Constitution." *See F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582, 586 (1942). This Court has required that the agency reasonably explain its choice of remedies and justify any departure from prior practice or policy.

In *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), the Interstate Commerce Commission dealt with a service interruption due to labor unrest by certificating a new carrier rather than issuing a cease and desist order, but failed to articulate any rational explanation for its choice.

The Court refused to allow the agency to choose the more drastic remedy without rationally explaining why:

> "Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the [affected parties] and the public. Nor did it articulate any rational connection between the facts found and the choice made."

Id. at 165.

The Oklahoma Corporation Commission committed the same error.

The only reason articulated by the Commission for vacating the existing orders was to avoid the "indirect delegation" of the implementation of police power objectives to "any owner" whose interests might conflict with the Commission's stated objectives. Due process requires more than a vague reference to unnamed "owners" and unidentified "subjective interests." Moreover, as argued above, this rationale provides no support for the remedy chosen.

4. Oklahoma's Action Impairs Petitioners' Contracts in Violation of Article I, §10.

The Contract Clause limits the power of the state to impose substantial impairment of contractual relations unless necessary to meet an important general social problem. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

In *Allied* the Court invalidated a Minnesota statute which increased the obligation under pre-existing pension plans of employers who either terminated the plan or closed a Minnesota office. In essence, the statute increased the financial burdens on one party to a contractual relationship. The Court stated:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to careful examination of the nature and purpose of the state legislation."

438 U.S. at 245.

Allied identified four factors discernible from prior decisions which demonstrated the invalidity of the Minnesota pension law: (1) the lack of a broad social problem which the enactment was to remedy; (2) operation in a new area of state regulation; (3) permanent and immediate, as opposed to temporary, impairment; (4) narrow class of those affected. *Allied*, 438 U.S. at 250. Those factors likewise are present here.

Of similar import is *United States Trust*, *supra*, where the Court voided a New Jersey statute deemed to impair

the contractural rights of holders of New York-New Jersey Port Authority bonds. The bonds had been purchased in reliance on a limitation on the ratio of deficit incurred by the Authority in running the PATH train system to the reserve fund for the Port Authority bonds. This Court struck down a statute which deleted the limitation, and thus impaired the bondholders' contracts by decreasing the security of their investments.

The impairment here is far more severe than those struck down in *Allied* and *United States Trust*. The mineral owner on whose tract each unit well was drilled along with his lessee has shared the production from that well with his neighbors in the other three quarter sections. Now, owners and lessees who have surrendered 3/4 of their own reserves have lost their legal right to share in production from the remaining 3/4 of the established unit lands. The State, having concluded that the well drains only A's tract, authorizes B, C and D to drill their own wells, and denies A any share of these wells at all. Of course, a lessee owning only a lease covering the drillsite is in precisely the same position.

Without denigrating the importance of the State's interest in promoting the exploitation of its resources consistently with avoiding waste, it can hardly be equated to the "important social problem(s)" found to justify past impairments, such as the need for emergency homeowner protection from mortgage defaults in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934).

More importantly, the impairment here is neither necessary to the achievement of Oklahoma's interest nor tail-

ored so as to wreak the minimum impairment of contract rights consistent with Oklahoma's objective.

Deleting the existing spacing units serves the State's objective of uniform development in only an indirect way at best. It authorizes, but does not require, the drilling of an additional well in each quarter section not currently containing one. The decision whether or not to drill is left to the economic judgment of whoever owns the right to drill. Thus, despite the drastic impairment of contract rights involved, there is no assurance that attainment of the State's objective will be furthered.

This underlines the availability of a far less drastic alternative which equally serves the State's interest. Oklahoma could have increased the allowable density of drilling within the existing units. Increasing the density would have authorized, without requiring, additional wells and committed the actual decision to drill to the sound economic judgment of the interest owners involved. In other words, increasing density has precisely the same legal effect on further development as respacing without any impairment of contract rights.

Moreover, both before and after this case, Oklahoma consistently has chosen to increase density rather than respace because increased density does not impair contract rights. On April 27, 1979, the Corporation Commission in Order No. 152489, recognized the abberational nature of the state action in this case:

> "[I]t has been the policy of the Commission, where there has been a sharing of production to intensify drilling rather than re-spacing. The recent Garfield

> County order [Order No. 148243 involved here] is an exception to long established policy."

Appendix at 96a.

Since that exception to established policy unnecessarily works a substantial impairment of petitioners' contract rights, it violates the Contract Clause.

CONCLUSION

For the foregoing reasons, petitioners Union Texas Petroleum, *et al.*, respectfully submit that this Court should grant this Petition for Writ of Certiorari.

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